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Conscience Leave

Andrew K. Jennings

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ABSTRACT

In the federal government, political officials come and go while civil servants remain. In the ordinary course, the political officials make decisions about what policies the government will pursue while civil servants use their labor and expertise to carry those policies out—even when they disagree with them. But what happens when political officials pursue policies that civil servants view as deviating from normal bounds—policies that are unethical, immoral, or unlawful? This Article examines when and how civil servants might object to such policies, including going so far as to leave government service. It concludes that when faced with such situations, employees' personal benefit-cost analyses will generally lead them to not object to deviating policies.

Of the costs federal employees must consider, the dominant one is usually economic: They need a job and cannot afford to leave one without having another lined up. Although existing civil-service rules partly reduce this cost—such as through giving anti-retaliation protections to whistleblowers—those protections are often insufficient to motivate objection. As a corrective, this Article proposes the introduction of "conscience leave." For employees facing deviating policies on the job, conscience leave would offer a safety net to go on paid, inactive status while searching for new employment. In return, leavers would report to Congress their reasons for taking leave. This safety net would promote several socially desirable outcomes, including enabling federal employees to serve consistent with their consciences, deterring deviating policies, and fostering congressional oversight.

INTRODUCTION

This Article considers a question that lingers over the last four years: "Why didn't they just quit?"

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Political officials number in the few thousands and are responsible for making significant policy decisions within a presidential administration. Yet because they are a small share of the overall federal workforce,[1] when political officials pursue policies contrary to ethical, moral, or legal bounds, they depend on the assistance, or at least the acquiescence, of career civil servants. This Article considers how civil servants respond to those policies, which I refer to as "deviations" or as "deviating." By this concept I mean more than disagreements, even bitter ones, over public policy. Rather, deviating policies are those that are repugnant to civil servants, as citizens or professionals, and that are beyond the broad bounds of policy discretion.[2]

Deviation typically cannot be achieved without the labor and expertise of career employees—such as attorneys, scientists, technicians, middle managers, and line workers—to help carry it out.[3] Given their necessary role in the success of deviating policies, it is tempting to ask why civil servants who personally object don't quit, withholding their labor and expertise, the resources needed to carry deviation out?[4] Civil servants, after all, possess agency.[5]

The answer is yes, of course, civil servants have agency. Exercising that agency to object to deviation might even sometimes be legally required or

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1. *Compare* H. COMM. ON OVERSIGHT & REFORM, 116TH CONG., REP. ON POLICY AND SUPPORTING POSITIONS iii (Comm. Print. 2020) (listing "over 9,000 Federal civil service leadership and support positions in the legislative and executive branches of the Federal Government that may be subject to noncompetitive appointment (e.g., positions such as agency heads and their immediate subordinates, policy executives and advisors, and aides who report to these officials)"), *with* JULIE JENNINGS & JARED C. NAGEL, CONG. RESEARCH SERV., R43590, FEDERAL WORKFORCE STATISTICS SOURCES: OPM AND OMB 6 (2020) (stating that in 2019 there were 2.669 million full-time-equivalent civilian employees in the executive branch).

2. In that light, this Article is about civil servants who find themselves in conscientious extremis. These situations would be distinguished from instances when bureaucrats push back against political officials but do so through internal channels and levers. *See, e.g.*, Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28. J.L. & POL. 129 (2013). I also restrict my analysis to civilian employees. Members of the armed forces already follow tailored and well-developed doctrines around obeying lawful orders and disobeying unlawful ones. *See* James Burk, *Responsible Disobedience by Military Professionals: The Discretion to Do What Is Wrong*, *in* AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA 149–71 (Suzanne C. Nielsen & Don M. Snider eds., 2009).

3. *Cf.* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 381–95 (2019) (offering a typology of regulatory staffers at the center of the administrative state).

4. Toward the end of the prior administration, a former Office of Legal Counsel lawyer reflected on her service and concluded that her and her colleagues' labor had legitimated the administration's deviating policies. It would have been better, she came to believe, for them to have resigned, thus withholding their services from the government. *See* Erica Newland, *I'm Haunted by What I Did as a Lawyer in the Trump Justice Department*, N.Y. TIMES (Dec. 20, 2020), https://www.nytimes.com/2020/12/20/opinion/trump-justice-department-lawyer.html.

privileged, such as when the obligation not to violate the law oneself or protected whistleblowing come into play.[6] But acting conscientiously is nevertheless constrained by material needs, like paying mortgages and student loans and supporting children.[7] Civil servants often have dedicated many years to their careers and comparable employment might not be easily found. After all, employed persons tend to have greater success in the job market than unemployed persons—even if the cause of unemployment was a righteous resignation.[8] A civil servant conducting a personal benefit-cost analysis might thus make a compromise with conscience. As a result, she might help with political officials' deviating acts, which in turn would permit the social harms of broken laws or ethical or moral norms to occur.[9] If employees "do the right thing" by resigning; refusing to participate; blowing the whistle; or voicing objection in some other way, then the harm caused by the deviation can be avoided or mitigated—a benefit to the public. The employees will bear the costs, however, such as by going without a job, accepting an available-but-less-desirable job, or experiencing retaliation. This reality points

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> If, early on, the Justice Department lawyers charged with selling the administration's lies had emptied the ranks—withholding our talents and reputations and demanding the same of our professional peers—the work of defending President Trump's policies would have been left to the types of attorneys now representing his campaign. Lawyers like Mr. Giuliani would have had to defend the Muslim ban in court.

Id.

5. *See* Bernardo Zacka, WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY 200–40 (2017) (analyzing the moral agency exercised by public-facing civil servants such as teachers, police officers, and social workers who face "impossible situations").

6. *See* Whistleblower Protection Act, 5 U.S.C. § 2302(b)(9) (2021) (prohibiting personnel actions against an employee who exercises an appeal, complaint, or grievance right; testifies for or lawfully assists any individual in the exercise of such rights; cooperates with or discloses information to an agency inspector general or to the Office of Special Counsel; or refuses to obey an unlawful order).

7. In her study of 142 protest resignations during the Trump administration, Professor Kathleen Clark found that only 21 were by civil servants. The rest were by political appointees, and many were part-time officials serving on advisory boards. Kathleen Clark, *Should We Stay or Should We Go: Lessons from the Trump Administration*, GEO. J. LEGAL ETHICS (forthcoming) (on file with author). Of those who publicly resigned in protest, 85% were individuals who already had other full-time means (that is, they merely served part-time on advisory committees) or were full-time political appointees and, thus, likely had personal connections and prestige that would allow them to quickly find new employment. Of course, during that time many civil servants might also have resigned in non-public protest, but it is telling that in this sample, those who relied most on their positions—civil servants—were least likely to resign despite vastly outnumbering those holding political appointments.

8. *See generally* Ronald Karren & Kim Sherman, *Layoffs and Unemployment Discrimination: A New Stigma*, 27 J. MANAGERIAL PSYCH. 848 (2012).

9. *Cf.* Sarah Isgur, *Opinion: We in the 'Shallow State' Thought We Could Help. Instead, We Obscured the Reality of a Trump Presidency*, WASH. POST (Dec. 23, 2020) ("We told ourselves that, by going in, we were preventing greater harm to the country. But we obscured the reality of a Trump presidency from the public. We gave voters a false sense of what kind of president Trump was.").

to a reverse collective-action problem of concentrated private costs and dispersed public benefits. But what if civil-service policy adjusted this balance so that employees would not bear the costs of objecting while the public enjoys the benefits? Could ethical, moral, or legal bounds be upheld if those employees were empowered to deny their labor and expertise to the carrying out of deviating policies?

I believe that the answer is that if policy so empowered civil servants, both federal employees and the public would benefit, the latter in the form of mitigated, thwarted, or deterred deviation by political officials. This Article proposes that civil-service policy adopt "conscience leave" as a safety net in which federal employees may leave government service rather than participate in, or acquiesce to, deviations sought by political appointees. Those who take conscience leave would remain inactive, compensated employees for a time while they are searching for new employment. In return, they would report to Congress their reasons for leaving. This approach would address the reverse collective-action problem by shifting employees' private costs of objecting (predominantly manifesting as economic precarity) to the public (manifesting as continued compensation to inactive employees). The benefits for the employee of such an option are evident, and the public would benefit in three key ways: Political appointees would be deprived of civil-service labor and expertise needed to carry out deviations, the credible threat of losing that labor and expertise could deter deviations, and Congress would be able to better monitor the executive branch. The Article also considers potential objections to and risks around conscience leave. It closes with recommendations for designing and implementing conscience-leave policy.

I. THE TROUBLE WITH STAYING

A. Child Separation: A Case Study

Whether a policy is deviating is a matter of subjective judgment. Reasonable minds perhaps can disagree in a given case. For this Article, I offer a case study from the prior administration—child separation and living conditions experienced by detained children, an issue first arising in an earlier administration—that I, and I expect many others, consider deviating. This policy resulted in at least 2,648 children being forcibly separated from their parents, a massive undertaking that could have only been accomplished with the assistance of countless federal employees.[10] In thinking about this case study, readers might ask themselves several practical questions, such as: "How would I have felt if I were asked to participate in this policy?"; "What would I have wanted to do?"; "What would have stopped me from doing so?"; and, "If I had been working as an attorney or in another role with distinct professional ethical

10. STAFF OF H. COMM. ON OVERSIGHT & REFORM, 106TH CONG., REP. ON CHILD SEPARATIONS BY THE TRUMP ADMINISTRATION 7 (July 2019).

commitments, how might that professional role have shaped my answers to the prior questions?"

In the spring of 2018, the prior administration announced a zero-tolerance policy requiring criminal prosecution of all individuals who unlawfully crossed the U.S.-Mexico border, including those who entered the country with children (family-unit adults).[11] This policy marked a shift in criminal unlawful-entry referral practice, which before had emphasized prosecutorial discretion.[12] Because family-unit adults were now criminally charged, the government separated them from their minor children, whom U.S. Customs and Border Patrol (CBP) held until the U.S. Department of Health and Human Services Office of Refugee Resettlement could take custody.[13] As implementation of this policy unfolded, shocking images emerged of children sleeping on concrete floors in cramped cages with only aluminum blankets.[14] Some children died while in government custody.[15] For hundreds more, the government struggled to find and reunite them with their parents.[16]

In its investigation of the policy and its implementation, the U.S. Department of Justice (DOJ) Office of Inspector General determined that although senior DOJ leaders claimed their "priority was to increase the number of immigration-related prosecutions in order to 'restore legality' to the Southwest border and decrease the number of illegal entries into the United States," the policy ultimately "came at the expense of careful and appropriate consideration of the impact that prosecution of family unit adults and family separations would have on children traveling with them and the government's

11. U.S. DEP'T OF JUST., OFFICE OF INSPECTOR GEN., REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES, No. 21-028, at 40 (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-028_0.pdf [hereinafter "OIG Report"].

12. *Id.*

13. *Id.* at 57–58; *see also* Rafael Carranza, *Migrant Kids in Border Patrol Custody Spend Almost Twice as Long as Allowed by Courts*, ARIZ. REPUBLIC (July 18, 2019), https://www.azcentral.com/story/news/politics/border-issues/2019/07/18/migrant-kids-custody-far-longer-than-allowed/1773721001.

14. *See, e.g.*, Ginger Thompson, *A Border Patrol Agent Reveals What it's Really Like to Guard Migrant Children*, PROPUBLICA (July 16, 2019), https://www.propublica.org/article/a-border-patrol-agent-reveals-what-its-really-like-to-guard-migrant-children; David A. Graham, *Are Children Being Kept in 'Cages' at the Border?*, ATLANTIC (June 18, 2018), https://www.theatlantic.com/politics/archive/2018/06/ceci-nest-pas-une-cage/563072.

15. Robert Moore, *Six Children Died in Border Patrol Care. Democrats in Congress Want to Know Why.*, PROPUBLICA (Jan. 13, 2020), https://www.propublica.org/article/six-children-died-in-border-patrol-care-democrats-in-congress-want-to-know-why.

16. Joel Rose, *Trump Administration Lags Reuniting Families Separated at Southern Border*, NPR NEWS (Oct. 21, 2020), https://www.npr.org/2020/10/21/926051647/trump-administration-lags-reuniting-families-separated-at-southern-border (reporting that the government had failed to reunite 545 children with their parents).

ability to later reunite the children with their parents."[17] Public outcry led to the child-separation policy being curbed by executive order months after it began, but the harms experienced by children who were separated from their parents and subjected to inhumane detention conditions were already done.[18]

The family-separation policy was the brainchild of senior political officials, but it required hundreds of civil servants—including assistant U.S. attorneys and DOJ attorneys, CBP personnel, and others—to carry it out. For instance, U.S. attorneys in border districts were expected by then-Attorney General Jeff Sessions to "prosecute as many unlawful-entry cases as possible . . . until all available resources were exhausted."[19] In litigation (pre-dating the separation policy) to enforce a consent decree requiring minors to be held only in "safe and sanitary" conditions "consistent with [the government's] concern for the particular vulnerability of minors,"[20] the Central District of California found that detained children were deprived of "hot, edible, or a sufficient number of meals," "clean drinking water," "clean bedding" and "hygiene products (i.e., toothbrushes, soap, towels)," and that they were subjected to sleep deprivation, cold temperatures, and overcrowding.[21] The DOJ Civil Division's Office of Immigration Litigation (OIL) contended, though, that the "safe and sanitary" mandate did not require CBP "to provide class members with soap, towels, showers, dry clothing, or toothbrushes" because the consent decree did not use those precise words.[22]

The child-separation policy was the *choice* of political leaders, but it was the *work* of career employees. Assistant U.S. attorneys in border districts used their professional skills to implement a zero-tolerance prosecution program that would necessarily require that children be separated from their parents and placed into CBP custody. The attorney general expected them to do so "until all available resources"—in other words, their labor and expertise—"were exhausted."[23] CBP personnel custodied the children in deplorable conditions. And DOJ attorneys defended it. Oral argument in the government's appeal from a district court order that CBP provide hygiene items to the children gained national attention in part because it personified the work of civil servants in carrying out such deviating policy.[24] There, Sarah Fabian, an OIL senior

17. *See* OIG Report, *supra* note 11, at 69.

18. *See* Affording Congress an Opportunity to Address Family Separation, Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 25, 2018).

19. *See* OIG Report, *supra* note 11, at 40–41.

20. Flores v. Sessions, 394 F. Supp. 3d 1041, 1052 (C.D. Cal. 2017).

21. *Id.* at 1053–60. This litigation stemmed from detention conditions arising during the prior presidential administration.

22. *Id.* at 1057.

23. *See* OIG Report, *supra* note 11, at 40–41.

24. *See* Manny Fernandez, *Lawyer Draws Outrage for Defending Lack of Toothbrushes in Border Detention*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/sarah-fabian-migrant-lawyer-doj.html; Ken White, *Why a Government Lawyer Argued Against Giving Immigrant Kids Toothbrushes*, ATLANTIC (June 23, 2019), https://www.theatlantic.com/ideas/arch

litigation counsel, engaged in a now-infamous colloquy with a Ninth Circuit panel:

> Judge Berzon: But you're really going to stand up and tell us that being able to sleep isn't a question of "safe and sanitary" conditions?
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> . . . .
>
> Fabian: . . . Your Honor, any number of things might fall under those categories. And I think . . .
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> Judge Berzon: Yes, but sleep surely does, right? You can't be "safe and sanitary" or safe as a human being if you can't sleep.
>
> Fabian: Well . . .
>
> Judge Berzon: And you said in your brief, it doesn't say anything about sleeping so therefore there's nothing in here about being able to sleep.
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> Fabian: I think the concern there is, Your Honor . . . finding that sleep, for example, falls under, is relevant to a finding of no "safe and sanitary" conditions, is one thing. But the ultimate conclusion is "safe and sanitary" is a singular category in the agreement and . . . it was, one has to assume, left that way and not enumerated by the parties because either the parties couldn't reach agreement on how to enumerate that or that it was left to the agencies . . . to determine . . .
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> Judge Fletcher: Or it was relatively obvious. It's at least obvious enough so that if you're putting people into a crowded room to sleep on a concrete floor with an aluminum foil blanket on top of them that doesn't comply with the agreement. I mean, it may be that they don't get super-thread-count Egyptian linens. I get that. But the testimony that the district judge believed was: it's really cold; in fact, it gets colder when we complain about its being cold; we're forced to sleep crowded with the lights on all night long; and all you put us on is the concrete floor with an aluminum blanket. I mean, I understand at some outer boundary there may be some definitional difficulty, but no one would argue that this is . . . "safe and sanitary." Or at least I don't think you're arguing that, are you?
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> Fabian: Your Honor I think what I'm arguing is that . . . the way that the district court reached the conclusion was to say these . . . specific items, and I think, I will acknowledge . . . sleep is the more difficult end of what I'm arguing . . .
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ive/2019/06/why-sarah-fabian-argued-against-giving-kids-toothbrushes/592366 (describing the government's argument as "morally indefensible" but arguing that "[t]he fault lies not with any one administration or politician, but with the culture: the ICE and CBP culture that encourages the abuse, the culture of the legal apologists who defend it".).

> Judge Tashima: It's within everybody's common understanding that, you know, if you don't have a toothbrush, if you don't have soap, if you don't have a blanket, it's not "safe and sanitary." Wouldn't everybody agree to that? Do you agree to that?
>
> Fabian: Well, I think . . . there's fair reason to find that those things may be part of "safe and sanitary."
>
> Judge Tashima: Not "may be." *Are* a part! Why do you say "may be"? Do you mean there are circumstances when a person doesn't need to have a toothbrush, toothpaste, and soap for days?
>
> Fabian: . . . in CBP custody . . . it's frequently intended to be much shorter term, so it may be that for a shorter-term stay in CBP custody that some of those things may not be required.
>
> Judge Fletcher: . . . It wasn't as though those people were there for twelve hours and then moved on to the Hilton Hotel. No, they were there for a fairly sustained period. And at least according to the evidence that the judge believed, they weren't getting these things for a fairly sustained period.[25]

As the transcript would suggest, the panel affirmed that the district court's order that "children eat enough edible food, drink clean water, [be] housed in hygienic facilities with sanitary bathrooms, have soap and toothpaste, and [not be] sleep-deprived" was a "commonsense understanding" of what "safe and sanitary" conditions required under the consent decree.[26] A year after the child-separation policy began, 65% of American adults viewed the practice as unacceptable.[27] The policy was also criticized by civic and religious leaders. The chairman of the U.S. Conference of Catholic Bishops' Committee on Migration, for instance, issued a statement that "[f]orcibly separating children from their mothers and fathers is ineffective to the goals of deterrence and safety and contrary to our Catholic values. Family unity is a cornerstone of our American immigration system and a foundational element of Catholic teaching."[28] The level of popular objection to child separation would support that the policy was a deviation from existing moral settlements around how the government polices immigration. And outrage at Fabian's advocacy around

25. United States Court of Appeals for the Ninth Circuit, *17-56297 Jenny Flores v. William Barr*, YOUTUBE (June 18, 2019), https://www.youtube.com/watch?v=Z2GkDz9yEJA (video recording of oral arguments in Flores v. Barr, 934 F.3d. 910 (9th Cir. 2019) (the exchange quoted above begins at 24:29 and then again at 30:39)).

26. Flores v. Barr, 934 F.3d 910, 916 (9th Cir. 2019).

27. Shibley Telhami & Stella Rouse, *Americans Views on President Trump's Immigration Policies*, CRITICAL ISSUES POLL, (Apr. 2019), https://criticalissues.umd.edu/sites/criticalissues.umd.edu/files/umcip_questionnaire_april_2019.pdf.

28. *U.S. Bishops' Migration Chairman Urges Administration to Keep Families Together*, U.S. CONF. OF CATH. BISHOPS (June 1, 2018), https://www.usccb.org/news/2018/us-bishops-migration-chairman-urges-administration-keep-families-together.

detention conditions reinforces an intuition that that was not how the public expects those in government custody, especially children, to be treated.

After her argument at the Ninth Circuit sparked outcry, Fabian posted a statement to her personal Facebook page.[29] It explained that she was "not an official of any administration" but that as a career employee, she took a "technical legal position" on behalf of the government.[30] Speaking for herself, Fabian assured readers that she "personally believe[d] that we should do our very best to care for kids while they are in our custody" and that she did not believe that the "position [she] was representing" was to oppose providing hygiene products to children.[31] She closed by saying ". . . I share many people's anger and fear at times over the future of our country, and I want to work to make it better too."[32] Fabian semi-publicly expressed her personal discomfort with the policies that she defended in her role as a civil servant; presumably many of the line prosecutors, CBP personnel, and other federal employees who carried out the child-separation policy privately felt similar conscientious conflicts. If so, that recalls the lingering question: Why did they do it?

B. What's a Civil Servant to Do?

If civil servants—like those who participated in child separation—face a prospective policy that is deviating (or colorably deviating), they confront a series of decisions. The first is whether to object or not. If they choose to object, then they must decide whether to do so by voice or by exit. If it is voice, there

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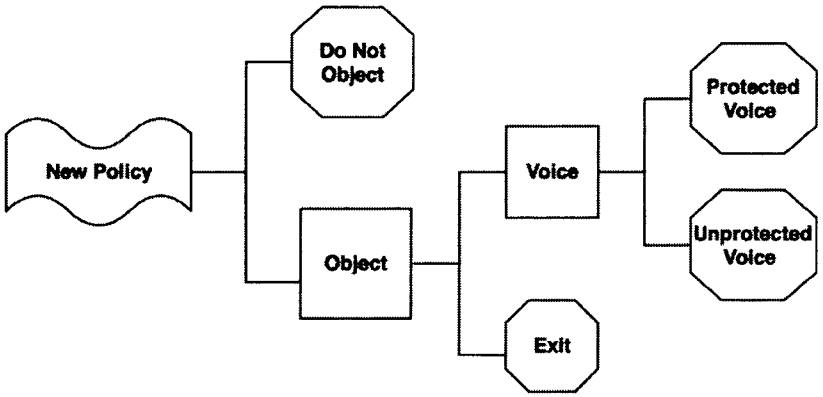
29. Josh Lederman, *Justice Department Lawyer Defends Herself After Viral Video on Child Migrant Treatment*, NBC NEWS (June 25, 2019, 6:50 PM), https://www.nbcnews.com/politics/politics-news/justice-department-lawyer-defends-herself-after-viral-video-child-migrant-n1021771.

30. *Id.*

31. *Id.* To be sure, Fabian did not argue that children in CBP detention ought not have, for example, hygiene products. Flores v. Sessions, 394 F. Supp. 3d 1041 (C.D. Cal. 2017). She instead argued that the district court modified a consent decree to impose new requirements (making the order subject to interlocutory appeal), whereas the Ninth Circuit recognized that the district court merely interpreted, but did not modify, the decree (meaning it was *not* subject to interlocutory appeal). Flores v. Barr, 934 F.3d 910 (9th Cir. 2019). However, even if the government truly believed that the district court's order was an appealable modification of a consent decree, the order's remedies were manifestly reasonable, and the government advanced no argument that the order would prejudice some other interest or create an adverse precedent. In that light, because a procedure-based objection to the district court's order would not vindicate a governmental interest, it was indistinguishable from a substance-based objection to the trial court's humanitarian remedy. By that point, the government had failed for years to provide "safe and sanitary" conditions to the minors it custodied. *See generally* Flores v. Sessions, 394 F. Supp. 3d 1041 (C.D. Cal. 2017). The litigation gave responsible political leaders ample notice to correct the problems on their own, such that their failure to do so represented a choice. They presumably would have continued in that choice had their hand not been forced. This posture thus points to the question of conscience facing a hypothetical attorney: Why should *I* participate if it means that *I* must advocate for a decision that will enable political leaders to deprive children of food, soap, toothbrushes and toothpaste, and other basic necessities, especially given that there is no greater interest than just *that* to defend?

32. Lederman, *supra* note 29.

are many forms that course might take, depending whether a particular expression of voice is protected by civil-service policy. The decision to exit, in contrast, is a decision to leave government service entirely.[33] The following chart illustrates these options.



These decisions will first depend on employees' subjective assessments whether prospective policies are deviating. If they assess them as so, then their choices will be further driven by a balance of the benefits of objection (including psychic satisfaction in doing the right thing or in the public benefits that will result, avoiding personal liability for participating in unlawful activity, or avoiding personal reputational damage) against its costs (such as retaliation, loss of income or job satisfaction, and upset expectations for career progression). These costs take numerous forms and are subject to employees' individual endowments and preferences. A prosecutor in a high-prestige post who hopes to obtain a law-firm partnership or judgeship[34] might have different perspectives on raising objections or resigning in protest than those of a budget analyst working in northern Virginia. Their perspectives in turn might vary considerably from someone who is glad to have found a well-paying federal job in her rural hometown. Apart from purely material interests, civil servants might also feel deep loyalty to their agencies, or at least the missions they

33. In this Section I adapt from the exit-voice-loyalty model of organizational decay. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINES IN FIRMS, ORGANIZATIONS, AND STATES (1970).

34. On one hand, this person can likely find another job relatively quickly, perhaps at a law firm that pays multiples of a government salary. On the other hand, voicing objections or resigning in protest could disrupt relationships and other considerations relevant to non-pecuniary career goals.

support or the people with whom they work.[35] Thus, they might be reluctant to leave the object of their loyalty behind and, possibly, worse off for it.[36]

1. No Objection

If an employee supports a prospective policy, feels indifferent about it, or views it not as a deviation but as within the normal bounds of policy discretion (even if she personally disfavors it), then she will take no action other than to do her job as usual.[37] This lack of objection might include helping carry out the policy. This decision typifies the work of civil servants—they might support political leaders' policies, or they might wish for other policies, but regardless, they will apply their labor and expertise as directed by leaders.

Example 1: New leadership in an agency responsible for providing services to low-income persons decides to adopt more stringent eligibility standards and to reduce service levels.[38] Mary, an employee in the agency, has long believed that the agency's eligibility standards and service levels discourage clients from becoming economically independent; she welcomes the new policy. Marty, another employee, would like to see the agency expand its eligibility and services and believes that the proposed cuts will hurt clients, but he accepts that the new administration has a different view. He will adapt to changes the new policy creates for his job.

2. Objection by Voice

Civil-service policy has entitled employees to exercise voice in certain circumstances. These expressions of voice are *protected.* For instance, if employees find a prospective policy to be unlawful (or wasteful, fraudulent, or abusive), then because they have a duty not to engage in unlawful acts themselves, and because they have an entitlement to blow the whistle, they may refuse to participate in the deviation and may report it through designated

35. *See* HIRSCHMAN, *supra* note 33, at 76–105.

36. *Cf.* David Luban, *The Case Against Serving*, JUST SECURITY (Nov. 14, 2016), https://www.justsecurity.org/34404/case-serving-trump (evaluating the loyalty and public-interest motivations that might lead individuals to serve in a Trump administration notwithstanding their moral, ethical, or rule-of-law concerns about what that service might require).

37. Some civil servants, such as those in attorney roles, might have independent professional obligations that guide this analysis. A litigating attorney, for instance, has obligations to courts that are independent of other considerations. Still, professional rules should generally align with this Article's analysis. Attorneys may withdraw from representations, for instance, if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." MODEL RULES OF PRO. CONDUCT r. 1.16(b)(4) (AM. BAR ASS'N 2020).

38. *Cf.* Phil McCausland, *Despite Rulings, Medicaid Work Requirement Leaves 16,000 Arkansans Without Health Care*, NBC NEWS (Mar. 31, 2019, 11:10 AM), https://www.nbcnews.com/news/us-news/despite-rulings-medicaid-work-requirement-leaves-16-000-arkansans-without-n989211 (discussing Arkansas's view that its federal waiver to require Medicaid recipients satisfy work requirements was "a way to bolster self-sufficiency in the state's poorest population").

channels.[39] Thus, in theory, by exercising protected voice, employees will avoid participating in deviation without risking their economic interests, their job satisfaction, their future career goals, and so forth.

When voice is unprotected, employees might nevertheless raise concerns within their agencies or seek accommodations against participating in what they view as deviating—such as seeking exemptions from certain tasks, reassignment to other tasks, or transfer to another agency or sub-agency. But, if they have no entitlement against participating in a policy, employees will relent if their superiors demand they do so. That is because an outright refusal would be insubordinate, and thus, would be expected to result in discharge or other consequences.

Employees are quite exposed if they decide to exercise voice when there are no protected options for doing so. But even protected objections could expose them to retaliation.[40] A savvy employee knows that protected voice is a partly illusory promise.[41] For instance, employees might suffer prohibited personnel practices, such as being discharged or being denied a promotion or a raise because they blew the whistle.[42] Such retaliatory actions are unlawful, but employees who experience them must seek recourse through time-consuming administrative and judicial processes.[43] Even if they do obtain relief, employees' expectations for their economic well-being, their careers, or even the direction of their lives will have been disrupted in the meantime, perhaps irreparably. What is worse, employees might fail to satisfy the procedures needed to trigger anti-retaliation protections, barring them altogether from

39. *See infra* note 42 (listing some of those channels).

40. *Cf.* Blair Druhan Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. (forthcoming 2021), (manuscript at 27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583144 (reporting Merit Systems Protection Board survey data that 49% of federal employees who make discrimination-related charges also make retaliation claims, and that 21% of non-discrimination-related charges also include retaliation claims).

41. *But see* OFFICE OF PERSONNEL MANAGEMENT, 2020 FEDERAL EMPLOYEE VIEWPOINT SURVEY: GOVERNMENT MANAGEMENT REPORT 11 (2020) (reporting 68% of federal-worker respondents agreed with the statement "I can disclose a suspected violation of any law, rule or regulation without fear of reprisal").

42. *See* Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8)–(9) (prohibiting personnel actions against employees who blow the whistle—including to Congress or an agency inspector general—or who refuse to comply with unlawful orders); *see also id.* § 2302(a)(2)(A) (defining "personnel actions" as including appointments; promotions; disciplinary and corrective actions; detail, transfer, or reassignment; reinstatement; restoration; reemployment; performance evaluations; compensation and training decisions; orders for psychiatric testing or examinations; implementation or enforcement of nondisclosure provisions; or "any other significant change in duties, responsibilities, or working conditions").

43. *See* U.S. MERIT SYS. PROT. BD., WHISTLEBLOWER PROTECTIONS FOR FEDERAL EMPLOYEES 43–47 (2010) (describing overlapping administrative processes for appealing personnel actions alleged to be retaliatory).

relief.[44] And of course, they might also experience soft retaliation—social snubs, coworker tension, loss of internal champions—that do not rise to the level of forbidden employment actions but that can have profound impacts on one's working life and career despite not being remediable through legal process.[45]

Example 2 (Protected Voice): The director of the exemplar social-services agency determines that the agency will outsource its claims-management system to a vendor, which, the director claims, will cut costs. The director instructs Mursel, one of the agency's procurement officers, to sign a contract with a vendor, which was founded by the director's former college roommate, on a sole-source, no-bid basis. Mursel believes that the contract price is roughly three times as high as government software projects of similar scope and scale that are sourced through competitive bidding. After weighing the risks and placing his confidence in the strength of whistleblower protections, he submits a report to the agency's inspector general that the proposed contract is wasteful and likely violates procurement rules.[46] He braces for what might come next.

Example 3 (Unprotected Voice): Political officials in the prior exemplar agency hope to reduce the number of people receiving services. They decide that the agency's case workers will conduct eligibility audits of all existing clients, which will require clients to produce copious documentation to maintain eligibility.[47] Martha, a case worker, suspects that this policy change is being made in bad faith because many clients will struggle to satisfy the audit requirements even though they remain eligible, causing them to lose benefits. She raises this concern with her supervisor and does not volunteer to be on the audit team. Two weeks later, however, her supervisor insists that she is needed for the effort due to the heavy workload involved. She reluctantly agrees,

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44. As an example of foot faults facing prospective whistleblowers, the Federal Circuit—which exercises nationwide jurisdiction over federal civil-service retaliation claims—has held that "[c]riticism directed to the wrongdoers themselves is not normally viewable as whistleblowing" because the Whistleblower Protection Act requires "disclosure." Horton v. Dep't of the Navy, 66 F.3d 279, 282 (Fed. Cir. 1995). Objecting to the wrongdoer is not a "disclosure," as the court sees it, because the wrongdoer is already aware of his or her actions. *Id.*

45. *See* Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2226 (2017) ("Congress' willingness to pay money for information reflected its implicit recognition that anti-retaliation law could only go so far; back pay and the threat of lawsuits could not protect employees from stigma and discrimination too subtle to prove. Financial bounties would therefore close these gaps.").

46. *See* Competition in Contracting Act of 1984, 41 U.S.C. § 3301(a) (requiring that, subject to certain exceptions, executive agencies engaged in procurement use "full and open competition through the use of competitive procedures").

47. *Cf.* Stephanie Armour, *Plan to Revamp Medicaid-Eligibility Checks Draws Criticism*, WALL ST. J. (Jan. 13, 2020), https://www.wsj.com/articles/plan-to-revamp-medicaid-eligibility-checks-draws-criticism-11578848400 ("States are largely required to make annual eligibility checks to verify income, residency, and citizenship status, but some are going further and imposing checks every few months, in some cases leaving beneficiaries 10 days to respond, or they can lose coverage.").

although she feels guilty for being partly responsible for some clients she audits losing their benefits. She cannot, however, afford to leave her job without another in hand. In any case, she believes in the agency and its mission and does not want to abandon it.

3. Objection by Exit

Exit is likely rare. This option requires employees to accept leaving government service to prevent their labor and expertise from being used in proposed deviations. Prospective leavers do the same benefit-cost analysis as those who voice their objections, but their benefits must be especially great, or their costs especially small, for them to choose this option. For instance, a potential deviation might be so egregious that a civil servant cannot, as a matter of profound conscience, stay, no matter the economic or other costs. Or, as a matter of public interest, an exit could be sufficiently noteworthy so as to garner press or congressional attention and, thus, perhaps, to thwart the deviation.[48] Outside compelling benefits for leaving, the civil servant might have financial wherewithal (such as inherited wealth, a well-paid spouse, or immediate retirement eligibility) or attractive opportunities (such as a lucrative job offer in the private sector) that reduce exit costs. Most employees facing deviating policies, however, will not be in a position that exit has overwhelming benefits or bearable costs. It might be hoped that civil servants will act out of conscience and refuse to lend their labor or expertise to deviation even if doing so requires them to leave. But that would be the extraordinary case given that the benefits of conscientious objection will so rarely exceed its costs.

Example 4: The director of the exemplar agency asks to meet with Miko, the career chief of the enforcement division. The director asks Miko to open, and publicly announce, a fraud investigation into Governor Mayor. When Miko asks why, the director replies: "If you look, you're sure to find something, and the public announcement will get you tips to help find that something." Miko knows that Governor Mayor is planning to run against the incumbent president and quickly surmises that this investigation is intended to sully Mayor's reputation.[49] Miko wants no part of this move. She warns her deputy of the director's plans and then calls a major firm that had long sought her as its compliance chief, accepts the job, and leaves the agency.[50]

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48. *See* Clark, *supra* note 7, at *18 (reviewing protest resignations in which resigning employees concede that they could not stop deviations while in government and that as a result, exiting and speaking publicly offered a greater chance of having an effect).

49. *Cf.* Andrew E. Kramer, *Ukraine's Zelensky Bowed to Trump's Demands, Until Luck Spared Him*, N.Y. TIMES (Nov. 7, 2019) (reporting that President Volodymyr Zelensky of Ukraine, at then-President Donald Trump's insistence, was prepared to publicly announce an investigation that would cast aspersions on then-candidate Joe Biden).

50. *Cf.* Julia Ainsley, *Top Justice Department Official Brand Quit Partly Over Fear She Might Be Asked to Oversee Russia Probe*, NBC NEWS, https://www.nbcnews.com/politics/justice-department/justice-department-official-brand-leaves-partly-over-fear-she-might-n847156 (Feb. 13, 2018, 12:36 PM) (reporting on former Associate Attorney General Rachel Brand's decision to leave

III. THE VALUE OF EXIT

A. Outlining Conscience Leave

When civil servants act counter to deviating policies, the moral, ethical, and rule-of-law benefits for the public can be considerable. But those benefits are widely dispersed among the public. In contrast, the costs are concentrated in those civil servants who decide to do the right thing. The previous Section described a status quo that is unlikely to motivate conscientious objection at a level reflecting how often political officials seek deviating policies. It also identifies gaps in civil-service policies that are designed to reduce the costs of objection.[51] This Part examines how a provision for conscience leave might correct those problems in a way that will see the public cover most of the costs of conscience just as it receives most of the benefits. Such a corrective, it would be hoped, would cause civil servants to conscientiously object more often. Conscience leave might also bolster civil servants' exercise of voice, and not just of exit. That is because if any employee knows that he can object by exercising voice and that he has the safety net of conscience leave should there be unbearable reaction to his objections, he will perceive less cost ex ante to objecting and will be more likely to do so.

With those considerations in mind, and although the details are very much open, I envision conscience leave as having the following features.

First, employees who encounter deviation in connection with their jobs would be eligible to take the leave. Determining when situations warrant taking leave should largely be left to the employee as a matter of conscience, subject perhaps to limitations—a few possibilities of which I discuss in Section III.B. If there is too fine a definition of "deviation," or employee decisions can be too easily second guessed, then the leave option will be less certain to employees, less credible to political officials, and generally less effective at deterring deviation. In any case, taking leave should not be subject to too much delay; as deviating policies arise, civil servants might need to act quickly.

Second, employees who take leave would become inactive employees who continue to receive their usual compensation for a period. That period might be in the range of two to five months, depending how Congress designs

her position after less than a year to accept a position as executive vice president of global governance at Walmart, Inc.).

51. Direct costs associated with needing compensation are more easily remediable by policy: cash, in the form of continued pay, will do. There are costs to objecting that are harder to cover, though. For instance, a civil servant who exits might find a job with similar or even better economic compensation that is nevertheless of inferior quality to the employee, perhaps because it is less rewarding, lacks preferred perks, requires a long commute, and so on. For employees whose future career prospects will be nurtured by personal relationships and reputation fostered in government, disrupted ambitions might be irremediable.

the policy.[52] This setup would allow leavers to go on the job market as employed individuals, without the stigma that some employers attach to out-of-work applicants.[53]

Third, employees taking conscience leave must provide an explanation of the facts underlying their taking it. The explanation should be provided to Congress—perhaps to designated majority and minority staff of the House Committee on Oversight and Reform and the Senate Committee on Homeland Security and Governmental Affairs—and to their agencies' inspectors general.[54] This reporting would enhance the ability of Congress, including minority parties, to hold the executive branch to account.[55]

This tying of congressional reporting to conscientious resignation would also address a gap in civil-service protections. Outside the civil-service context, Professor Miriam Baer notes that Congress recognizes the protections offered by anti-retaliation statutes are insufficient and partly compensates for that insufficiency through cash bounties paid to whistleblowers.[56] In Section II.B, I discuss that problem in the civil-service context and its tendency to concentrate the costs of conscientiousness onto civil servants and to disperse its benefits among the public. Continued pay during a conscience leave would serve the same purpose as a whistleblower bounty. For instance, if an employee whose all-in compensation is $120,000 per year were allowed to take three months' conscience leave, she would effectively be paid a $30,000 bounty.

Last, employees who take conscience leave are likely to be talented, integrity-motivated employees whom the public would wish to serve in government again. Conscience leave should not be a one-way door. If conscience leavers wish to return to civil service, the implementing policy should facilitate their doing so one day. This consideration would reduce the costs of taking conscience leave because employees who feel loyalty to their agencies' missions or to public service generally would know that they are making a career detour rather than an irrevocable break. It would also ensure that government has a shot at future high-quality hires.

Part II considered the benefit-cost analysis confronting a federal employee when a potential deviation arises on the job. It hinted at the public interest in civil servants objecting to deviation; this Part focuses more squarely on that

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52. *See* R. Jason Faberman & Marianna Kudlyak, *The Intensity of Job Search and Search Duration*, 11 AM. ECON. J.: MACROECONOMICS 327, 348 fig. 7 (2019) (identifying job-search durations of one to twenty-five weeks in a large dataset from a job website).

53. *See* Karren & Sherman, *supra* note 8.

54. *Cf.* Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8) (protecting employees who make disclosures to Congress, congressional committees, agency inspectors general, or the Office of Special Counsel).

55. Of course, if congressional chambers are controlled by the same party as the presidential administration, they might not act. But members of the minority party would have some ability to respond, including by requesting information from the relevant agency, raising the issue with the public, and exerting pressure on majority colleagues up for reelection.

56. *See* Baer, *supra* note 45.

interest. The public is harmed by deviation in one or more ways. If a deviation is unlawful, then it harms the public's interest in the rule of law and its interest in having democratic institutions, like Congress, decide what the law is to be. If a deviation is not unlawful, but it does violate ethical or moral norms, it harms the public's interest in having a government that exercises policy discretion consistent with broadly held values. Whether a particular policy is deviating and, thus, whether it harms the public, is subjective for members of the public just as it is for civil servants. But if conscience leave were available, it would have several potential on-the-ground impacts.

First, it could thwart or deter deviation. This effect occurs in the sense that an employee who takes conscience leave remains a budgetary cost for the agency. Without supplementary appropriations, the agency cannot fill the leaver's spot without pulling funds from other projects. Indeed, perhaps to avoid gamesmanship, conscience-leave policy should prohibit budget reallocations from being used to replace those on leave. In this sense, conscience leave would deprive political officials of the labor and expertise they need to make deviations work.[57] For instance, if career federal prosecutors discussed in Section I.A. had taken conscience leave en masse and thereby reduced the government's capacity to separate children and parents, they would have pushed the government to the point that "resources were exhausted"[58] sooner, forcing it to relent.

Conscience leave not only can thwart deviation, but it can also deter it. If political officials know that pursuing deviating policies might cause them to lose a critical mass of their civil service—with no added budget to fill leavers' spots—they might not bother with such deviations in the first place. In other words, if a presidential administration is committed to such policies and believes that it would face significant levels of exit for pursuing them, then it would instead need to shift the bounds of acceptable policy choice, such as through obtaining legislation from Congress or by moving public (or civil-service) opinion.

Second-order benefits might also reveal themselves. For instance, the availability of conscience leave would be a valuable benefit to prospective federal employees who are integrity motivated, whereas it would not be valued by prospective employees for whom such motivations are lacking. Compensation of government employees would thus implicitly discriminate in

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57. *Cf.* Hannah Arendt, *Personal Responsibility Under Dictatorship*, *in* RESPONSIBILITY AND JUDGMENT 17, 47 (1964).

> [T]he nonparticipators in public life under a dictatorship are those who have refused their support by shunning those places of "responsibility" where such support, under the name of obedience, is required. And we have only for a moment to imagine what would happen to any of these forms of government if enough people would act "irresponsibly" and refuse support, even without active resistance and rebellion, to see how effective a weapon this could be.

Id.

58. *See* OIG Report, *supra* note 11, at 40.

favor of conscientious applicants, which would be expected, at the margins, to produce a more conscientious federal workforce.[59] Conscientious public servants are a public benefit not only because they are the most likely to object to deviations, but also because they themselves would be expected to engage in lower levels of wrongdoing or shirking on the job.

B. Toward a Conscience-Leave Policy

There is much to be determined about conscience-leave policy in terms of adopting a statute and implementing regulations; educating federal workers; and designing how agencies and Congress will handle the administrative aspects of taking leave and ending leave once an inactive employee has found new employment. There are several key questions that would need to be answered in that process. How likely would employees be to take conscience leave? How many have encountered instances of deviation, and how often? What types of deviations have they encountered? What types of jobs do those employees hold? How many former civil servants left government service for conscientious reasons? How long would leave need to be offered in order to allow employees enough runway to find suitable new employment, thereby making them willing to take leave? How should issues of privilege and professional ethics be handled when those taking conscience leave serve in professional roles that carry independent ethical commitments? And what about when issues of national security are implicated?

The answers to those questions would shed light on the need for conscience leave and its potential impacts on government operations and policymaking. The Merit Systems Protection Board (MSPB) is already tasked with conducting studies of the civil service, which is does partly through workforce surveys.[60] Its expertise in this area would recommend it to study issues relevant to conscience leave, which would provide Congress with a strong factual record upon which to design the policy and write appropriate legislation. Such a study would also inform Congress and the public about the prevalence of unlawful, immoral, and unethical pushes by political officials, in addition to the old concerns of waste, fraud, and abuse. Thus, although I ultimately propose a major innovation in civil-service policy, my immediate prescription is fairly modest: Congress should commission the MSPB to conduct a study and release a report of its findings, including on the key

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59. *Cf.* Scott J. Vitell & D. L. Davis, *The Relationship Between Ethics and Job Satisfaction: An Empirical Investigation*, 9 J. BUS. ETHICS 489, 493 (1990) (finding "that managers might be able to improve job satisfaction by reducing the opportunities for unethical behavior within their companies and by attempting to encourage ethical behavior on an industry level as well").

60. *See* 5 U.S.C. § 1204(a)(3) (directing the Merit Systems Protection Board to "conduct . . . special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected"); U.S. MERIT SYS. PROT. BD., BROWSE STUDIES, https://www.mspb.gov/studies/browsestudies.htm (last visited Apr. 11, 2021) (archiving federal-workforce surveys and other studies).

questions discussed here. With that report in hand, congressional committees would be able to craft appropriate conscience-leave policy.

No doubt, what I propose is not without its potential pitfalls. There are at least a few concerns conscience leave would raise, which would need to be addressed in implementing the policy. Chief among those concerns is whether conscience leave would be antidemocratic.[61] This leave, by design, would give individuals, whose accountability to voters is quite attenuated, some small ability to thwart the policies of a presidential administration by depriving agencies of budgeted labor and staff expertise. Any antidemocratic effects, however, could likely be outweighed by *pro*-democratic effects. Civil servants are already free to register personal objection to government policy by resigning—even if doing so would disrupt government operations or investments in human capital. Indeed, objection by resigning is a well-established practice.[62] Conscience leave would merely turn this long-standing practice into an affirmative public policy by making it available to employees who lack means to exit without a new job. When political officials seek to deviate from democratically enacted laws or ethical or moral norms, taking conscience leave would bolster those bounds and allow members of Congress, as *elected* officials, to exercise oversight.[63] More, if conscience leave actually were to thwart political officials' policies, that would imply that a sufficient mass of civil servants took leave such that those officials couldn't

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61. *See* Jennifer Nou, *Civil Servant Disobedience*, 94 CHI-KENT L. REV. 349, 356 (2019) (recognizing the democratic concerns civil-servant disobedience can raise); Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1654 (2018) ("Usually any mention of a deep state conjures up images of shadowy and powerful antidemocratic cabals that threaten popular rule."); *but see* Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009) (concluding that internal constraints imposed by civil servants is an integral part of the modern executive branch).

62. *See* Nou, *supra* note 61, at 378 (acknowledging that "[p]erhaps the strongest objection to civil servant disobedience is that civil servants, unlike private citizens, can and should exit the objectionable entity" and noting the view that "[r]esigning is the only legitimate way for civil servants to resist . . ."); Richard H. Kohn, *On Resignation*, 43 ARMED FORCES & SOC'Y 41, 42 (2017) (criticizing the concept of "principled resignation" by senior military officers and addressing scholars who "have suggested that officers who receive orders that so compromise their morality or ethics, or promise such unnecessary catastrophe for the country or their troops, must have the possibility of 'principled resignation'"); Edward McGlynn Gaffney, Jr., *The Principled Resignation of Thomas More*, 31 LOY. L.A. L. REV. 63, 64 (1997) (noting that "cabinet ministers in Europe more typically leave the government because they can no longer support the position of the government in a dispute over a burning issue of the day, and not because they are hounded from office for their misdeeds"); Burton Gummer, *"Committing the Truth": Whistle-Blowing, Organizational Dissent, and the Honorable Bureaucrat*, 9 ADMIN. SOC. WORK 89, 94 (1985) ("Conventional wisdom has it that if one cannot administer a policy, one should resign.").

63. *Cf.* Michael M. Ting, *Whistleblowing*, 102 AM. POL. SCI. REV. 249, 249–50 (2008) (noting that a justification for whistleblower protections is that "principals (such as Congress) can . . . benefit from the information possessed by organization members . . . who do not normally interact with them").

muster the resources needed to carry the policies out. If such a thing happened, it would evidence a widely held view of those on the ground that proposed policies were indeed deviating and not the sort of thing citizens would expect their government to do.[64] Of course, if conscience leave did produce unacceptable antidemocratic effects, elected officials would retain power to recalibrate the policy to address those problems.

Beyond the potential for antidemocratic effects, conscience leave could be abused. Employees who are poor performers, or who engage in wrongdoing themselves, might take leave in bad faith in order to avoid discharge. So too might shirking employees. The costs of potential abuse are likely to be outweighed by the public benefits, however. They can also be mitigated. Indeed, it is more likely that civil servants will have grounds to take conscience leave and not do so than the reverse. Whistleblowing is a daunting proposition and, thus, reporting channels should err on the side of encouraging individuals to come forward.[65] Conscience leave itself would be such a move, as it reduces the barrier for individuals to object, apart from relying on existing civil-service policies that might be inadequately protective.

Implementing policy can mitigate against potential abuse. Leave should end once the leaver accepts new employment. This approach would be consistent with the purpose of the policy—allowing civil servants to object to deviation without risking a period of unemployment—while avoiding windfalls to individuals who do not need that full safety net. The policy might also restrict leave to once in a career. Employees who conscientiously leave government service would be promising candidates to rejoin government in the future; a once-in-a-career restriction would be expected to discourage using conscience leave frivolously and would prevent it from facilitating a revolving door for career positions. It is also possible that employees who take leave in bad faith might be individuals whose contributions are net negative to public service. Their departures, even if abusive of conscience-leave policy, could make way for higher-quality replacements. Although this collateral benefit is not the point of conscience leave, it nevertheless could make the civil service, and the public, better off in many cases.

Other mitigations against abuse or antidemocratic effects might include limitations on what situations will qualify for conscience leave. Exclusion of policy that follows statutory or judicial mandates, for instance, could be deemed pro-democratic and supportive of the rule of law. If the public is to allow for conscience leave, it would need to serve the public's interest; as a general

64. *See* Clark, *supra* note 7, at *14 ("The power of concerted action can be seen not just when resignations occur simultaneously, but also when groups of officials threaten to resign in order to deter abuses.").

65. *See* U.S. DEP'T OF JUST. CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 6 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download ("Prosecutors should assess whether the company's complaint-handling process includes proactive measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers.").

matter, that interest would be less likely served if the public subsidizes countervailing objections to democratically enacted laws or judicial applications of those laws. Other possible limitations might include that only discretionary policy decisions by executive-branch officials that implicate an employee's duties would qualify. If leave-qualifying situations are kept to those involving an employee's duties, then the benefit will be open just to those who do not want to participate in a deviating policy, rather than to those who object to what is happening in another corner of government.[66] This last restriction might further be justified because those in the thick of it will often be better placed to assess whether a policy is deviating or not. They would also be most likely to have useful information to offer Congress or inspectors general.

I offer one final note on moving toward a conscience-leave policy. This Article focuses on the federal government and the federal civil service. There is no reason, though, that conscience leave could not be used in state and local governments, as well. Perhaps a federal conscience-leave policy could model to state and local governments how to design and implement their own. Or, perhaps it is that level of government that might move first on conscience leave, giving Congress a model for a national policy. Private-sector organizations, like for-profit businesses or universities, could also lead the way in adopting internal conscience-leave policies.

CONCLUSION

Civil servants possess agency to object to deviating policies sought by political officials. Exercising that agency, though, can impose concentrated private costs on them, whereas the public enjoys most of the benefits of employees taking stands in defense of moral, ethical, and lawful policy bounds. That imbalance often results in employees opting *not* to object and, thus, leads to there being policy deviation that could have been prevented or mitigated. This Article proposes that that imbalance can be corrected so that the public will bear some of those costs itself. It can do so by supporting civil servants who conscientiously leave government during their searches for new employment. By subsidizing employee conscience, the public will reap the benefits of more frequent expressions of conscientiousness.

66. *See* Clark, *supra* note 7, at *14–18 (comparing the motivations of those who resign to avoid participation in improper acts and those who resign in order to reputationally disassociate themselves from a government that engages in such acts).